

6-4-1976

# Devonda Coogle, and Paul M. Lewis v. Normal L. Coogle

Appellant's Brief 1976-SC-0471

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**KYSC1976-SC-0471-01**

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# **APPELLANT'S BRIEF**

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# SUPREME COURT OF KENTUCKY

No. 76-471

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DEVONDA COOGLE, and  
PAUL M. LEWIS - - - - - Appellants

*versus*

NORMAN L. COOGLE - - - - - Appellee

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APPEAL FROM HARDIN CIRCUIT COURT  
HON. J. HOWARD HOLBERT, JUDGE

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## FILED BRIEF FOR APPELLANTS

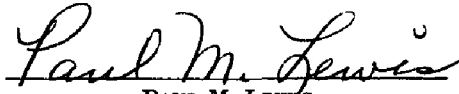
JUN 4 1976

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I hereby certify that a true copy of the foregoing was this 3rd day of June, 1976, served by mail on David Van Zant, 46 Public Square, Elizabethtown, Kentucky 42701, Counsel for Appellee, and to Hon. J. Howard Holbert, Trial Judge, Hardin Circuit Court, Elizabethtown, Kentucky 42701, pursuant to RAP 1.250.

  
PAUL M. LEWIS  
*Counsel for Appellants*

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### **STATEMENT OF THE QUESTIONS PRESENTED**

1. Should Appellant Coogle have been awarded the care, custody and control of the infant children of the parties?
2. Did the Court err and abuse its discretion in its award of marital property?
3. Did the trial court commit error when it did not award the wife any maintenance although the evidence clearly established that she lacked sufficient property to provide for her reasonable needs and is unable to support herself through appropriate employment according to the standard of living established during the marriage?
4. Did the trial court err when it ruled that each party should pay his or her own attorney's fees?

# SUPREME COURT OF KENTUCKY

No. 76-471

---

DEVONDA COOGLE, and  
PAUL M. LEWIS       -   -   -   -   -   -   *Appellants*

*v.*

NORMAN L. COOGLE       -   -   -   -   -   -   *Appellee*

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## BRIEF FOR APPELLANTS

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*May it please the Court:*

### STATEMENT OF THE CASE

#### (a) Nature of the Proceedings

This is an appeal from a dissolution action by the Appellant and her attorney, Paul M. Lewis, contending that the court erred in the following respects:

1. The court awarded the infant children of the parties to the Appellee, the father, instead of the Appellant, Devonda Coogle, the mother of the children.

2. The court did not equitably divide the marital property.

3. The court erred when it failed to award Appellant Coogle any permanent maintenance.

4. The court erred when it failed to order the Appellee to pay a reasonable fee to the Appellant Coogle's attorney.

The action was originally commenced in April, 1972, and by amended petition was recommenced in November, 1974 (T.R. 1 and 6). The judgment of the court entered on February 17, 1976, dissolving the marriage of the parties and awarding the custody of the infant children to the Appellee, and ordering the parties' real estate sold and dividing the other marital property, and further providing that each party pay his or her own attorney's fees, resulted in this appeal.

### **(b) Facts**

The Appellant, Devonda Coogle, and Appellee, Norman L. Coogle were married on April 1, 1960. As a result of this marriage, there were two children born, Damon D. Coogle, born November 4, 1962 and Louis B. Coogle, born April 30, 1966 (T.R. 1). The Appellant Coogle originally filed an action for divorce in April, 1972, and at that time, the court awarded her both temporary and permanent care, custody and control of the two infant children of the parties (T.R. 4). The parties later reconciled until November, 1974, when an amended petition was filed by the Appellant Devonda Coogle (T.R. 5). On January 7, 1975, at a hearing for temporary custody, the court awarded the two infant children of the parties to the Appellee. The court also allowed the Appellant Coogle the sum of \$75.00 per month for her maintenance during the pendency of the matter (T.R. 13). During the pendency of the action, the Appellee did everything he could to prevent the Appellant Coogle from visiting with her children (T.E.



27). The Appellee was staying in the residence of the parties, since the Appellant Coogle had left because the Appellee had shot at her with a shotgun (Deposition of Appellant Coogle, June 18, 1975, page 22). The Appellant Coogle took the eight year old child with her, Louis, and went to Elizabethtown to try to rent an apartment (Deposition of Appellant Coogle, June 18, 1975, page 24). The parties continued to have trouble, and the Appellee filed a motion asking the court to terminate all visitation rights of the Appellant, Devonda Coogle (T.R. 14). At that hearing, the court indicated that he was going to allow the Appellee to reside at the residence, that he could have all the furniture, all the vehicles, and he told the Appellant Coogle to stay away from her own home (Deposition of Appellee, July 2, 1975, page 83, T.R. 20). This was an indication of how the court was going to rule in this matter at final disposition.

After all the evidence was in, the court took the matter under submission and in January, 1976, advised the attorneys for the parties that he had reached a decision. In February, 1976, he signed the judgment for dissolution of the marriage, and this appeal followed.

## ARGUMENT

### **I. Appellant Coogle Should Have Been Awarded the Care, Custody and Control of the Infant Children of the Parties.**

The lower court in its judgment awarded the custody of the two infant children of the parties, Damon Coogle and Louis Coogle, to the Appellee. Louis was born April 30, 1966, and Damon was born on November 4, 1962. Even though these children were of tender age, the court still awarded their custody to the Appellee. This was clearly erroneous for the following reasons:

The rule is well-established in Kentucky that the mother of infant children should have custody of them unless she is a person of unfit character. *Liles v. Liles*, Ky., 432 S. W. 2d 814; *Stillwell v. Stillwell*, Ky., 420 S. W. 2d 130. This reasoning is based on the common sense understanding that there is no substitute for a mother's love for her children, and that the mother is better able to care for small children since she can spend more time with them during the growing-up process. The only evidence whatsoever of the alleged unfitness of Appellant Coogle was a brief affair she had with a gentleman by the name of David Rose after the dissolution began. The majority of the depositions taken in this matter deal with this one affair, and there is not a shred of evidence that Appellant Coogle did not take good care of her children while she was living at home with them. Appellee, himself, testified that during the marriage she had kept a good house and had taken good care of their children (Deposition of Appel-

lee, taken July 2, 1975, page 91). Marilyn Coogle, the sister of the Appellee, when asked about how Appellant Devonda Coogle had treated the children during the marriage testified as follows:

Q. 33. When Devonda was home, in Cecilia did she take good care of the children?

A. Yes she did.

Q. 34. Children seemed to love her?

A. Yes.

Q. 35. Mind her?

A. Yes.

Q. 36. She cook for them some, done the washing, dishes?

A. Yes.

Q. 37. Slaved over a hot stove?

A. Not slaved over a hot stove. I don't imagine no woman does that now days.

(Deposition of Marilyn Coogle, taken July 2, 1975, pages 121-122.)

Luella Sue Nichols, the aunt of Appellant Devonda Coogle, also testified that Appellant Coogle was a good mother, loved her children and took very good care of them (Deposition of Luella Sue Nichols, June 18, 1975, page 96).

On the other hand, the evidence concerning the Appellee's relationship with the children was that he had beaten them over the years, mistreated them, and that they were extremely afraid of him (Deposition of Appellant Coogle, June 18, 1975, pages 32, 34).

As stated *supra*, the majority of the depositions taken in this action concerned an alleged affair that was going on between the Appellant Coogle and a man

named David Rose. There was no mention of the Appellant Coogle's supposed affairs with any other men. Indiscreet associations with another man do not turn a mother into being so morally unfit that her character is detrimental to the welfare of her children. *Dixon v. Dixon*, Ky., 340 S. W. 2d 230. The law is clear that the moral unfitness of the mother must be to an extent that it would be detrimental to the children involved. *Id.* at 231.

In the case of *Hinton v. Hinton*, Ky., 377 S. W. 2d 888, the court held that the wife should have been awarded custody of the infant children since there was no evidence of her unfitness. In a later case, *Chastian v. Chastian*, Ky., 405 S. W. 2d 758, the Court of Appeals (now Supreme Court of Kentucky) reversed the lower court's ruling which had granted custody of three children to the father. The Court held that unless the mother is unfit, she should be awarded the custody of small children. The children in this case were ages 10, 9, and 5. The court concluded by stating that "they found no substantial evidence that the Appellant was morally or otherwise unfit to have the custody of her three small children." *Id.* at 759. That case is very similar to this case because there is no substantial evidence to indicate that this mother should be deprived of her two children.

What is ironic in this case is that the trial court in its original temporary award allowed the Appellant Coogle \$75.00 per month to live on (T.R. 13). Therefore, the court, itself, practically forced the Appellant Coogle to find someone to share an apartment with to

help her with her living expenses (Deposition of Appellant Coogle, June 18, 1975, page 28). Appellant Coogle testified as to her living conditions on the \$75.00 a month allowance the court provided her as follows:

Q. 281. Where do you claim to have lived from February of 75 to April of 75 when you moved in with Mr. Rose?

A. Well let me tell you, on \$75.00 a month you live wherever you can. I lived with my aunt. I lived with my uncle. Backwards and forwards from one place to the other. I have got a little bit of pride and I don't like people having to think they take care of me.

Thus, the court after turning the Appellant Coogle out in the cold without means of support, then takes away her children because she allegedly moved in with another man since she did not receive enough money from her own husband to maintain herself. This type of abusive discretion should clearly be reversed by this Court.

Since the court's finding that the Appellant Coogle was unfit to have her children is not substantiated by any evidence, this Court should reverse and remand, and award the custody of these infant children to their mother, whom they have been with since birth. The Court should also remand the matter to the lower court for a determination as to the amount that the Appellee should pay Appellant Devonda Coogle for support and maintenance of these children.

## II. The Court Erred and Abused Its Discretion in Its Award of Marital Property.

Property accumulated by the parties during the marriage consisted of a nine room house worth approximately \$25,000.00; eight rooms of furniture worth approximately \$1,000.00; a 1968 pick-up truck worth approximately \$1,500.00; a 1966 Chevrolet Impala worth approximately \$400.00; a 1967 Pontiac which was sold for \$385.00 (Deposition of Appellant Coogle, June 18, 1975, pages 6, 7, 9, and 12). There was also a 1970 Ford truck worth \$3,000.00 (Deposition of Appellee, July 2, 1975, page 25).

The court divided the above marital property by ordering the house and lot sold, and awarded the rest of it to the Appellee. Appellant Devonda Coogle only received some miscellaneous pots and pans that she had taken with her when she was forced to move out of the house due to the actions of the Appellee (Deposition of Appellant Coogle, June 18, 1975, page 22). Thus, out of this marriage of some sixteen years, the Appellant Coogle received nothing, and the court erred in failing to divide the marital property. *Smith v. Smith*, 497 S. W. 2d 418. It is interesting to note that on the day the amended petition was filed in this matter, the Appellee transferred two vehicles owned by the parties hereto to the Appellee's father (Deposition of Appellee, July 2, 1975, page 75). This is an indication of the type of person that the Appellee is, and is an obvious attempt to defraud his wife out of any of the marital property acquired during the marriage. It is ironic

that it turned out that his devious actions were not required since the court did not award the wife her fair share of the marital property anyway, and awarded it all to the Appellee. The trial court was clearly erroneous in doing this and abused its discretion in its award of the marital property.

**III. The Trial Court Committed Error When It Did Not Award the Wife Any Maintenance Although the Evidence Clearly Established That She Lacked Sufficient Property to Provide for Her Reasonable Needs and Is Unable to Support Herself Through Appropriate Employment According to the Standard of Living Established During the Marriage.**

The court's temporary order did grant the Appellant Coogle the grand total of \$75.00 per month for her support and maintenance, however, the final judgment in this action did not award the Appellant Coogle any maintenance whatsoever (T.R. 13, 305). The court clearly committed error when it failed to award her any maintenance.

This was a woman who had raised two children, cleaned house and cooked during their 16 year marriage. She has an eighth grade education and has no special skills to enable her to obtain any gainful type of employment (Deposition of Appellant Coogle, June 18, 1975, pages 18, 20). The Appellant Coogle has briefly worked as a waitress and when the parties were first married and the youngest child was a baby, she did try to drive a taxi cab about three weeks in order to

earn enough money to buy milk for their baby (Deposition of Appellant Coogle, June 18, 1975, page 69).

In regard to the Appellee's earnings, the evidence was that he made over \$200.00 take home pay a week when he worked (Deposition of Appellee, July 2, 1975, page 5). The Appellee also received income from other sources, such as outside jobs hauling gravel and other things, in addition to renting his truck to the construction company he worked for. Appellee had a tendency, however, during the taking of evidence in this action, to not disclose all the income he was to receive or did receive (T.E. 14).

KRS 403.200 has been interpreted by the courts to require maintenance be awarded to a spouse if that spouse lacks sufficient property to provide for her reasonable needs, and is unable to support herself through appropriate employment according to the standard of living established during the marriage. *Casper v. Casper*, Ky., 510 S. W. 2d 253. The evidence in the matter now before this Court indicates that the Appellant Coogle has no property, other than a few pots and pans, and she is unable to support herself through appropriate employment. During the marriage, the parties lived in a nine room house, had plenty of food and had three or four vehicles at their disposal at all times (Deposition of Appellant Coogle, June 18, 1975, pages 5, 7, 9, 12).

After reviewing the evidence in this matter, it is clear that Appellant Devonda Coogle should have been awarded maintenance and the lower court abused its



discretion in failing to so provide. *Priddy v. Priddy*, Ky., 504 S. W. 2d 711; *Bell v. Bell*, 494 S. W. 2d 517; *Chapman v. Chapman*, Ky., 498 S. W. 2d 134.

**IV. The Trial Court Erred When It Ruled That Each Party Should Pay His or Her Own Attorney's Fees.**

KRS 403.220 provides that the court may, after considering the financial resources of the parties, order one party to be responsible for the costs of the action, including the other party's attorney's fees.

From the sale of the parties' residence, the Appellant Coogle received absolutely nothing (T.R. 322). The Appellee purchased the home for \$10,000.00, which was an inadequate price since the parties hereto had given \$14,500.00 for it six years previously, and the valuation evidence on the property was that it was worth \$25,000.00 (Deposition of Appellee, July 2, 1975, pages 11, 13). Therefore, it is clear that the Appellee has financial resources enabling him to pay the attorney's fees of the Appellant Coogle. On the other hand, the Appellant Devonda Coogle has no money, and the court clearly erred and abused its discretion when it ordered the Appellant Devonda Coogle to pay a reasonable fee for the services of her attorney. KRS 403.220 and *Morgan v. Morgan*, 427 S. W. 2d 225.

## CONCLUSION

With due respect to the lower court, it's plain to see that the Appellant Coogle has been treated quite unfairly. The court has taken away her house, her furniture, her cars and trucks to which she had an interest in, and most importantly, her two children. What type of person is the Appellant Devonda Coogle? She is the type of person who would drive a taxi cab in Louisville, Kentucky so that she could earn money to buy milk for her baby. She is the type of person that dearly wants to have her children with her, and which were wrongfully taken. She is the type of person who was thrown out into the street and given \$75.00 a month to live on, and then condemned because of living arrangements that she had to obtain required her living ever so briefly with another man.

It is obvious that the only reason the court took these children away from the Appellant Coogle was because of this alleged affair she was having with one man by the name of David Rose. This is obvious from the fact that when the original action was commenced, the same court gave the Appellant Coogle the care, custody and control of the infant children. Therefore, he obviously thought she was fit at the time to be a mother to these children.

On the other hand, what type of person is the Appellee? He is the type of person who transferred his vehicles to his father as soon as the amended petition was filed in this matter in an attempt to defraud

the Appellant Coogle out of any of her rights to this marital property. He is also the type of person who will not disclose his true income, and when asked why he wouldn't tells the court that no one asked him. He is the type of person who has been accused of beating his children, and has done everything in his power to turn his children against their mother, who so dearly loves them.

It is conceded that a lower court is granted a wide degree of discretion in a dissolution matter. However, when the court in exercising its discretion flagrantly violates the rights of a person, then this Court should step in as final arbitrator of justice. This may be just another case among the many cases that the Court is faced with on appeal. However, to the Appellant Devonda Coogle this is the most important thing in her life. It involves her children and throughout this entire proceeding, she has told us that she loves nothing more than she loves her children and she wanted nothing more than to have her children with her. Possibly only a mother could know what it would be like to lose her child.

The lower court's judgment should be reversed, and the care, custody and control of these two children should be awarded to the Appellant Coogle. The matter should also be remanded to the lower court for a more equitable division of the marital property, and award of maintenance for the Appellant Coogle, and also for a determination of a reasonable fee for the services of

the Appellant Coogle's attorney to be paid by the Appellee.

Respectfully submitted,

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